Public Comments of the MIC Coalition Submitted in Response to the U.S. Department of Justice's Request for Comment on the Future of the ASCAP and BMI Consent Decrees

July 22, 2020

The Music Innovation Consumers Coalition ("MIC") is pleased to submit the following comments in response to the Justice Department's latest request for input on the future of the consent decrees governing the American Society of Composers, Authors, and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI").[1] MIC members include a vast majority of the nation's leading restaurants, bars, hotels, wineries, local radio and television broadcasters, digital music services and retailers that operate in every state, region and congressional district across the country.[2]

Collectively, MIC members spend more than a billion dollars annually in fees to license the right to publicly perform musical works and we profoundly depend on the consent decrees to ensure that we can license those rights under terms that are reasonable and free from monopolistic pricing. Since the Coalition's inception, MIC has tirelessly advocated before Members of Congress, the U.S. Copyright Office and this Department to promote a licensing regime that encourages increased transparency, efficiency and competition.

With regard to increased competition, in particular, as between the PROs and other possible sources for licenses, the Coalition highlights a few key observations for the Department's consideration.

- In 2013, the consent decrees helped shed light on acts undertaken by ASCAP and BMI to secretly coordinate with music publishers in an effort to allegedly limit access to their catalogues for certain licensees.[3]

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[1] Department of Justice, Office of Public Affairs (July 10, 2020). *Department of Justice Antitrust Division to Host Workshop on Competition in the Licensing of Public Performance Rights in the Music Industry*. [Press release]. Retrieved from https://www.justice.gov/opa/pr/department-justice-antitrust-division-host-workshop-competition-licensing-public-performance.

[2] For more information regarding the MIC Coalition, please visit: https://mic-coalition.org/#who-we-are

[3] *In re Petition of Pandora Media, Inc.,* 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc. v Pandora Media Inc.*, 2013 WL 6697788 (S.D.N.Y. Dec. 18, 2013).

- Less than one year later, in 2014, it was revealed that ASCAP had engaged in acts of "troubling coordination" with a couple of major music publishers in a manner that implicated a core antitrust concern underlying its consent decree.[4]

- In 2016, the Justice Department discovered that ASCAP had been including exclusivity requirements in its contractual agreements with affiliates in clear violation of the terms of its decree.[5]

- Finally, over the course of the past decade or so, ASCAP and BMI have both witnessed their respective revenues surge by approximately 50% to reach all-time record highs.[6]

The aforementioned observations are just a few of the key considerations regarding the effect on music licensees and consumers of the type of "competition" that exists in the marketplace today and that would undoubtedly be made worse if requests for modifications of the decrees are granted. This explains MIC's strong opposition towards any effort aimed at modifying or terminating the existing consent decrees governing ASCAP and BMI. We continue to believe that the current decrees include important, pro-competitive elements that benefit licensees, members of the songwriting community, and consumers, and that the pursuit of any ill-advised or untimely modification could disrupt the current delicate balance.

The existing delicate balance is particularly critical as our nation faces an ongoing crisis with catastrophic short-term and uncertain long-term effects. As the Justice Department is well aware, the recent COVID-19 pandemic has wreaked havoc on the nation's economy. It has ushered in weekly jobless claims often exceeding 1 million per week and a national unemployment rate in excess of 30 million.

The impact of the current pandemic on members of the MIC Coalition has been massive.

- **Restaurants and Bars** – The restaurant industry has suffered catastrophic sales and job losses since the COVID-19 outbreak began. Simply put, the industry has been crippled. It was the first mandated to shut down and will be the last to recover. Over 8 million restaurant employees have been laid off or furloughed, representing two out of every three restaurant jobs. Four in ten restaurants have closed their doors, some with no hope of reopening. Overall, the industry is projected to sustain $240 billion in revenue losses by the end of the calendar year.

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[4] *In re Petition of Pandora Media, Inc.,* 2014 WL 1088101 (S.D.N.Y. Mar. 18, 2014).

[5] Department of Justice, Office of Public Affairs. (May 12, 2016). *Justice Department Settles Civil Contempt Claim against ASCAP for Entering into 150 Exclusive Contracts with Songwriters and Music Publishers* [Press release]. Retrieved from https://www.justice.gov/opa/pr/justice-department-settles-civil-contempt-claim-against-ascap-entering-150-exclusive

[6] ASCAP. (May 1, 2019). *ASCAP Annual Revenue and Distributions Continue to Break Records: 2018 Revenue Tops $1.227 Billion* [Press release]. Retrieved from https://www.ascap.com/press/2019/05/05-01-financials-release; Christman, Ed (Sep. 12, 2018). *BMI Revenue Growth Accelerates as Collections and Royalty Distributions Reach New Highs*. Billboard. Retrieved from https://www.billboard.com/articles/business/8474665/bmi-2018-annual-collections-revenue-royalty-distributions.

These impacts and economic challenges are devastating to an industry that is one of low margins, tight cash flow, and a workforce that depends on it for their livelihood. Given the recent increase in COVID-19 cases, state and local government mandates have shut down almost 100,000 restaurants in just the past two weeks alone. Many restaurants have publicly stated that they cannot survive the recent start and stop to business operations and will likely have to close permanently.

- **Hotels** – The hotel industry has been decimated by the current health crisis. Typically, the industry supports more than $1.2 trillion in GDP, including nearly $400 billion in wages and $186 billion in state, local and federal taxes as well as 8.3 million in jobs. However, due to stay-at-home orders, mandatory shutdowns, and social distancing measures, hotel rates and occupancies have dropped to historic lows. The average daily rate (ADR) for hotels fell 44% nationwide in April compared to last year and 42% in May, with declines nearly as large as 60% in certain locales. The economic loss is estimated to be nine times greater than the loss experienced during the September 11th terrorist attacks. According to CBRE and STR, the industry is expected to lose more than 50% of its total revenue in 2020 – which would exceed $120 billion.

- **Public Venues** – Public assembly venues, including auditoriums, arenas, convention centers, exhibit halls and performing arts centers typically attract millions of patrons to amazing events in both large and small communities across the country – often serving as the lifeblood of the local economy. Yet, in the wake of the current pandemic, many of these businesses were the first to close and will be the last to open, costing the industry tens of billions of dollars in lost revenues. As such venues begin to reopen (most likely in the next calendar year), they will be subject to millions of dollars in additional costs needed to properly retrofit their operations in order to protect public safety.

- **Broadcasters** – At a time when Americans are relying more on local TV and radio than ever before, broadcasters have taken an enormous hit to the advertising revenue they fundamentally depend on to stay on the air and remain free to their audiences. As businesses across the country have been forced to close their doors, including many affiliated with MIC members, advertising is among the first expenses cut and the last to return. Broadcasters have reported losses of anywhere from 40-90% of this income over the last few months and now ride the roller coaster of reopenings, re-closings and hopefully recoveries along with their business partners.

- **Movie Theaters** – Similar to the experiences of other MIC members, the movie theater industry is in severe distress as a result of the current pandemic. Year-to-date, overall revenues are estimated to be down at least 85%, and that figure continues to climb. The majority of movie theaters across the U.S. are shuttered. The slate of new major motion picture releases has been delayed for months, with no new theatrical releases since mid-March. The few theaters that are open are required to abide by strict social distancing guidelines that limit auditorium capacity. With no new films and extremely limited seating once theaters are able to reopen, movie theaters will be extremely slow to recover.

Realizing the devastating impact that COVID-19 has had on our nation's economy, Congress has already enacted several measures in an effort to avoid the closure of millions of small businesses and prevent a further uptick in blossoming unemployment numbers. While these efforts have been helpful, they only represent a fraction of the financial assistance that many MIC members will need to guarantee the continued survival of our respective businesses and the millions of jobs we're responsible for creating.

Moreover, the impact of COVID-19 has revealed for many businesses the tenuous line between operating successfully and being forced to shutter. Creating more uncertainty – and even chaos – in the music licensing space by modifying or terminating the existing consent decrees would be a risky proposition at the best of times, and even absent the threat of the current pandemic. It would effectively eliminate critical safeguards that help provide business certainty and protect MIC members from anticompetitive behavior; thereby making our path to recovery in a post-COVID environment extremely more difficult.

Finally, even in the absence of the current crisis, MIC continues to agree with the long list of bipartisan Members in the House and Senate who have written to the Justice Department regarding the future of the consent decrees.[7] In particular, we emphasize the observations expressed by Chairman Graham in his February 12, 2019 letter where he noted that, "[t]he antitrust protections of the decrees have allowed businesses to innovate and expand music offerings, which has generated greater revenue for songwriters."[8] In the same letter, he also pointed out that "the American consumer currently enjoys the world's most vibrant music market" and that the "current market is functioning rather well."[9]

The MIC Coalition strongly agrees with such sentiments. As such, we continue to urge the Department to refrain from taking any steps to terminate or modify the ASCAP or BMI consent decree.

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[7] Graham, L. "*Letter to Assistant Attorney General Makan Delrahim Inquiring about the Status of the Division's Termination Program*". (Feb. 12, 2019) ("Graham Letter I"); Graham L. "*Follow-up Letter to Assistant Attorney General Makan Delrahim after the Antitrust Division's Request for Stakeholder Comments*". Grassley, C., Goodlatte B., etc. "*Letter to Assistant Attorney General Makan Delrahim regarding the Antitrust Division's Judgment Termination Program*". (Jun. 8, 2018); Leahy, P., Klobuchar A., etc. "*Letter to Assistant Attorney General Makan Delrahim regarding the Antitrust Divisions' Recently Announced Initiative to Terminate Outdated Antitrust Judgments*". (Jun. 7, 2018).

[8] Graham Letter I.

[9] Id.

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